

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA

APRIL TERM, 1943

No. 8551

103

~~CHESTER BOWLES~~
~~PRENTISS M. BROWN~~, ADMINISTRATOR, OFFICE OF
PRICE ADMINISTRATION, PETITIONER

v.

AMERICAN STORES, INC., RESPONDENT

APPEAL FROM THE MUNICIPAL COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED JUNE 19, 1943

United States Court of Appeals for the District of Columbia.
Filed June 19, 1943. Joseph W. Stewart, Clerk.

**THE MUNICIPAL COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA**

OCTOBER TERM, 1942

No. 78

**PRENTISS M. BROWN, ADMINISTRATOR OF THE
OFFICE OF PRICE ADMINISTRATION, INTERVENOR-
APPELLANT**

vs.

AMERICAN STORES, INC., APPELLEE

**ON APPLICATION FOR APPEAL FROM THE MUNICIPAL COURT FOR
THE DISTRICT OF COLUMBIA, SMALL CLAIMS AND CONCILIA-
TION BRANCH**

Filed April 3, 1943

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I

1

Municipal Court

Small Claims and Conciliation Branch

4th and E Streets NW., Room 120, Washington, D. C.

JOSEPHINE MCCORRY AND PRENTISS M. BROWN, ADMINISTRATOR
OF THE OFFICE OF PRICE ADMINISTRATION

vs.

AMERICAN STORES, INC.

No. C 106493

The Municipal Court of Appeals for the District of Columbia. Filed Apr. 3, 1943. C. Newell Atkinson, Clerk.

Certificate

I hereby certify that the facts, issues, and rulings as stated in the application for the allowance of an appeal and objections are sufficiently and correctly set forth.

Witness my hand and seal of said court this 3d day of April 1943.

[SEAL]

JOHN P. McMAHON.

John P. McMahon, *Judge.*

2

The Municipal Court of Appeals for the District
of Columbia

JOSEPHINE MCCORRY, 1727 MASSACHUSETTS AVE. NW., WASHINGTON, D. C., PLAINTIFF; PRENTISS M. BROWN, ADMINISTRATOR OF THE OFFICE OF PRICE ADMINISTRATION, F. O. BLDG. #1, WASHINGTON, D. C., INTERVENOR-APPLICANT

vs.

AMERICAN STORES, INC., RESPONDENT

No. 39 (Original Court of Appeals No.)

The Municipal Court of Appeals for the District of Columbia. Filed Mar. 17, 1943. C. Newell Atkinson, Clerk.

Application for allowance of appeal from the Small Claims and Conciliation Branch, the Municipal Court for the District of Columbia, Civil Division

1. Prior to trial, Prentiss Brown, Administrator of the Office of Price Administration and applicant herein, was granted leave to intervene and thereby became a party to said action.

2. Applicant, being aggrieved by the judgment herein entered on the 13th day of March 1943, in the Small Claims and Conciliation Branch, the Municipal Court for the District of Columbia, Civil Division, in Case No. C 106493 (Municipal Court Docket) entitled Josephine McCorry v. American Stores, Inc., hereby applies for the allowance of an appeal therefrom to the Municipal Court of Appeals for the District of Columbia.

3. The nature of the proceeding was a consumer action to recover the sum of \$50 for a violation of the Emergency Price Control Act.

4. Trial was had without a jury.

5. The judgment entered and from which an appeal is sought is as follows: Judgment for \$5 and costs in favor of the plaintiff.

6. The grounds for this appeal are:

At the trial plaintiff by competent evidence established the following facts:

(1) The sale by respondent to plaintiff on November 14, 1942, of a can of soup for 14¢.

(2) The maximum price for such commodity established by the Price Administrator under the Emergency Price Control Act, and by the General Maximum Price Regulation promulgated April 28, 1942, and amendments thereto, was 10¢

(3) Such sale was in violation of the Emergency Price Control Act of 1942.

(4) The Small Claims Court found that there had been a sale at 14¢, that the maximum price was 10¢, and that such sale constituted a clear violation of the Act.

(5) The Small Claims Court over the objection of plaintiff and intervenor awarded the plaintiff \$5 and costs, and refused to award the sum of \$50 and costs, as specifically required by Section 205 (e) of the Emergency Price Control Act.

(6) Consideration of this case is urgent and necessary, as consumer actions pursuant to Section 205 (e) of the Act have been and are being withdrawn from the Small Claims Court by reason of the decision in Hall v. Chaltis, decided by this court on March 2, 1943, and in which decision the intervenor does not acquiesce. If the instant ruling is adhered to, consumer enforcement of the Emergency Price Control Act may soon become a nullity in the District of Columbia. Such a result would clearly be against the manifest intent of Congress (See S. Rep. No. 931, 77th Cong., 2d Sess., at p. 8) and which was recognized by this Court in Hall v. Chaltis, supra at p. 4 of the opinion.

(7) The judgment in this case thus raises an extremely important issue with respect to the general application and enforcement of the Act.

Wherefore, Prentiss Brown, Administrator of the Office of Price Administration and intervenor in this suit, respectfully applies for the allowance of an appeal from the judgment of the Small Claims and Conciliation Branch of the Municipal Court, Civil Division.

EDWARD H. HATTON,
Edward H. Hatton,
Attorney for Applicant,
Office of Price Administration,
F. O. Bldg. No. 1, Washington, D. C.

DAVID GINSBURG,
David Ginsburg,
General Counsel.

THOMAS I. EMERSON,
Thomas I. Emerson,
Associate General Counsel.

FLEMING JAMES, Jr.
Fleming James, Jr.
Chief, Litigation Branch

Attorneys for Office of Price Administration.

Subscribed and sworn to before me by Edward H. Hatton,
this 16th day of March 1943.

[SEAL]

C. HOWARD HUNT,
Clerk (Notary Public).

4 The Municipal Court of Appeals for the District of
Columbia

JOSEPHINE MCCORRY, 1727 MASSACHUSETTS AVE. NW.,
WASHINGTON, D. C., PLAINTIFF; PRENTISS M. BROWN,
ADMINISTRATOR OF THE OFFICE OF PRICE ADMINISTRATION,
F. O. BLDG., #1, WASHINGTON, D. C., INTERVENOR-APPLICANT

v.

AMERICAN STORES, INC., RESPONDENT

No. 39 Original (Court of Appeals No.)

The Municipal Court of Appeals for the District of Colum-
bia. Filed Mar. 19, 1943. C. Newell Atkinson, Clerk.

*Objections to application for allowance of appeal from the
Small Claims and Conciliation Branch, the Municipal Court
for the District of Columbia, Civil Division*

1. This case arose in the Small Claims and Conciliation
Branch of the Municipal Court for the District of Columbia,

Civil Division, by virtue of a complaint filed by Josephine McCorry, 1727 Massachusetts Avenue, N. W., Washington, D. C., plaintiff, on November 19, 1943, Case No. C-106493. The complaint alleges that the plaintiff had purchased a can of Campbell's soup at a store of respondent, American Stores, Inc., located at 17th and Corcoran Streets, N. W., on November 14, 1942 and had been charged 14¢ therefor, the maximum price for such canned soups having been established by the Price Administrator under the Emergency Price Control Act and by the General Maximum Price Regulation promulgated April 28, 1943 and amendments thereto, as 10¢ per can.

2. Trial of the issue was had on March 13, 1943 in the Small Claims and Conciliation Branch of the Municipal Court for the District of Columbia. The evidence adduced was as follows:

(1) On November 14, 1942, the plaintiff purchased a can of so-called "old-style" Campbell's soup, the sale price for which was 10¢ per can and for which she was charged 14¢. She had no sales slip or other evidence to corroborate her statement that the can was purchased in the respondent's store. She did, however, have a witness, one Ross Perry, who testified to the fact of the purchase on that date and corroborated her testimony in that respect.

(2) The can had marked on its top surface the crayon marking "14." The respondent's District Manager stated that the marking was similar to that used in their stores. Conclusive evidence was adduced with respect to the posting of ceiling prices throughout the store, the plaintiff's witness, Perry, also admitting this to be true, and the placing of proper markers on the shelves indicating the prices of the articles placed thereon. Evidence was adduced which showed that the crayon marking on the can indicating the price for the article was for the assistance of the cashier in adding the purchases made by a consumer and arriving at the total owing and due.

5 (3) Evidence was adduced which showed that approximately four weeks before the sale in question, Campbell's Soups had commenced distribution of a new can of soup called "New Recipe" on which the ceiling and sales price was 14¢. Evidence was adduced to show that old-style and new-style soups were kept on the same shelf, but that the price ceilings were properly posted, the shelves properly marked, and that any improper marking on the can in question was only as a result of a mistake and not with any intention of violating the price ceiling with respect thereto.

3. The Court awarded \$5.00 to the plaintiff, and, in making this award, stated that the duty was on the manager of the store to see that no mistakes were made in marking the cans which might result in the cashier making an overcharge. However, the plaintiff and the intervenor-applicant offered no evidence whatsoever of an intent to violate the price ceiling regulations, and it is submitted that the lack of any evidence on this point was the determining factor in the mind of the Court in awarding a judgment of \$5.00 rather than the \$50.00 sought by the plaintiff. The Court did not find as the intervenor-applicant states in Paragraph 4 of his Application for Allowance of Appeal, etc., that there was a *clear violation* of the Act. [Italics supplied.]

4. The respondent, American Stores, Inc., therefore objects to the Application for Allowance of Appeal from the Small Claims and Conciliation Branch of the Municipal Court for the District of Columbia, Civil Division, on the following grounds:

(1) By authority of the case of Patricia Hall, Appellant, Prentiss M. Brown, Administrator, Office of Price Administration, Intervenor, v. Stella Chaltis, trading as Stella's Ladies Shop, Appellee, Appeal from the Municipal Court for the District of Columbia, Small Claims Branch, decided March 2, 1943, the Trial Court is vested with the discretion of determining the amount of the award in light of the evidence adduced before it (page 3 of that opinion), and was not required arbitrarily to make an award of \$50.00.

(2) For the further fact that no evidence was introduced by Plaintiff or Intervenor-Applicant with respect to a showing of intent to violate the Act;

(3)* For the further fact that the Defendant introduced unimpeached testimony to the effect that there was no intent to violate the Act and if any overcharge was made it was by virtue of a mistake.

WALTER E. GALLAGHER,
Walter E. Gallagher,
McMAHON, DEAN & GALLAGHER,
821 Fifteenth Street NW., Washington, D. C.,
Attorneys for Respondent, American Stores, Inc.

Subscribed and sworn to before me this 19 day of March 1943.

[SEAL]

MYRA LOOSE,
Notary Public

Service is acknowledged this 19th day of March 1943.

EDWARD H. HATTON,
Edward H. Hatton,
Per H. L. SHINDERMAN,
Attorney for Applicant,
Office of Price Administration,
F. O. Bldg. No. 1, Washington, D. C.

The Municipal Court of Appeals for the District
of Columbia

No. 39 Original—October Term, 1942

No. C-106493

JOSEPHINE MCCORRY, PLAINTIFF, AND PRENTISS M. BROWN,
ADMINISTRATOR OF THE OFFICE OF PRICE ADMINISTRATION,
INTERVENOR

vs.

AMERICAN STORES, INC., RESPONDENT

The Municipal Court of Appeals for the District of Columbia,
filed Mar. 24, 1943. C. Newell Atkinson, Clerk.

Order

On consideration of the application for allowance of appeal
in the above entitled case,

It is Ordered by the Court that the application be, and the
same is hereby, granted.

WM. E. RICHARDSON, •
Chief Judge.

March 24, 1943.

A true Copy.

Test:

C. NEWELL ATKINSON,
Clerk of the Municipal Court of Appeals
for the District of Columbia.

[SEAL]

By K. MAURITA HARVEY,
Deputy Clerk.

[Endorsement on cover:] No. 78. Josephine Mc-
Corry, Appellant, and Prentiss M. Brown, Administrator
of the Office of Price Administration, Intervenor, vs. American
Stores, Inc., Appellee. The Municipal Court of Appeals for

the District of Columbia, filed Apr. 3, 1943. C. Newell Atkinson, Clerk.

8

Monday, May 10, 1943

The Court met pursuant to adjournment. Present: The Honorable WILLIAM E. RICHARDSON, Chief Judge, NATHAN CAYTON and ANDREW M. HOOD, Associate Judges.

Proclamation being made the Court is opened.

No. 78

PRENTISS M. BROWN, ADMINISTRATOR OF THE OFFICE OF PRICE
ADMINISTRATION, INTERVENOR-APPELLANT

vs.

AMERICAN STORES, INC., APPELLEE

The argument in the above-entitled case was commenced by Mr. Lowell Grady, attorney for intervenor-appellant, and was concluded by Mr. Walter E. Gallagher, attorney for appellee.

9 The Municipal Court of Appeals for the District
of Columbia

No. 78

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, INTERVENOR-APPELLANT

v.

AMERICAN STORES, INC., APPELLEE

Appeal from The Municipal Court for the District of Columbia,
Small Claims Branch

(Argued May 10, 1943—Decided June 8, 1943)

Lowell J. Grady for intervenor-appellant. Thomas I. Emerson, Senior Associate General Counsel, Fleming James, Jr., Chief, Litigation Branch, David London, Principal Attorney, and Edward H. Hatton, attorney, Office of Price Administration, were on the brief.

Walter E. Gallagher for appellee.

Before RICHARDSON, Chief Judge, and CAYTON and HOOD, Associate Judges.

RICHARDSON, Chief Judge: Josephine McCorry filed a consumer action against American Stores, Inc., in the Small Claims

and Conciliation Branch of the Municipal Court for the District of Columbia, claiming the sum of \$50 for an alleged violation of the Emergency Price Control Act.¹ Her complaint states that on November 14, 1942, at appellee's store at 17th and Corcoran Streets NW., she paid an excess charge on the purchase of a can of Campbell's soup.

10 On March 13, 1943, Prentiss M. Brown, Administrator of the Office of Price Administration, filed a petition for leave to intervene under Section 205 (d) of said Act.²

Leave to intervene was granted, the case was tried, a finding and judgment for the plaintiff for the sum of \$5 was entered, and the following exception noted:

"The O. P. A., thru Mr. Hatton notes exception to the Court's finding and judgment for plaintiff for \$5.00, and not for \$50.00."

On March 17, 1943, Prentiss M. Brown, as administrator and intervenor, applied to this court for the allowance of an appeal from said judgment. This application we granted.³ Plaintiff McCorry did not apply for an appeal.⁴

At the trial it was shown that on November 14, 1942, plaintiff purchased a can of so-called "Old Style" Campbell's soup, the ceiling price for which was ten cents, for which she paid the cashier fourteen cents.

About four weeks before this sale, Campbell's Soups had placed on the market a new soup product identified as "New Recipe" on which the ceiling price was fourteen cents. The cans containing the old and new products were placed on the same shelf, with the respective price ceilings properly posted and the shelves properly marked. A witness, one Perry, who accompanied plaintiff, testified that the prices were correctly posted and the shelves correctly marked.

For convenience of its cashier appellee had adopted a practice of having its clerks place a crayon mark indicating its

¹ Public Law 421—77th Congress, Chap. 26—2d Session.

² This section provides in part:

"In any suit or action wherein a party relies for ground of relief or defense upon this Act or any regulation, order, price schedule, requirement, or agreement thereunder, the court having jurisdiction of such suit or action shall certify such fact to the Administrator. The Administrator may intervene in any such suit or action."

³ Act of April 1, 1942, Public Law 512—77th Congress, Sec. 7 (a).

⁴ The appeal here is by the Administrator as intervenor, and not by the plaintiff. The intervenor is not a party to the judgment below. His interest is not in the subject of the particular suit, but in the rule of law involved in its decision. Our statute (Act of April 1, 1942, *supra*) authorizes an appeal by "any party aggrieved by any final order or judgment."

A question may hereafter arise as to the right of the administrator to prosecute an appeal under these circumstances, but as counsel have not raised the point either in briefs or argument we have not decided it. See *United States of America and Edward Roach v. Dick Johnson*, U. S. Sup. Ct. May 24, 1943, — S. C. T. —.

11 price on each article on its shelves. The can purchased by plaintiff was improperly marked fourteen cents instead of ten cents. This it appears resulted from the inadvertence of an employee. There was no evidence of an intent to violate the price ceiling regulations. It does not appear whether the plaintiff, having selected the can from a shelf properly marked, realized at the time that an overcharge was made by the cashier, or called attention to the error.

Upon these facts we think the trial court properly awarded plaintiff judgment for a sum less than the extreme penalty of \$50. Its judgment served the purpose of adequately compensating the consumer for the overcharge, and of a warning to this and other storekeepers that the highest degree of care must be exercised to avoid mistakes in ceiling prices.

In *Hall v. Chaltis*⁵ we held that a consumer's right to bring an action for the sum of \$50, conferred by Section 205 (e) of the Emergency Price Control Act, did not make a judgment for this amount mandatory in the absence of language imposing a fixed liability on the seller. Our decision on that appeal, to which both the plaintiff therein and the administrator as intervenor were parties, covers the instant case. Neither party applied to the United States Court of Appeals for the District of Columbia for a review. After careful consideration of the opinion we then rendered, we adopt it as the basis for our present decision. The circumstances of the case before us serve to further impress us with the soundness of its reasoning, that Congress could not have intended to penalize alike the inadvertent mistake of the merchant who honestly and intelligently endeavors to comply with the law and the contumacy of one who dishonestly violates it.

Affirmed.

12 Hood, Associate Judge, dissenting: The effect of the majority opinion is that while Section 205 (e) of the Emergency Price Control Act of 1942 permits an overcharged consumer to bring an action of \$50, where the overcharge trebled does not exceed that sum, he is entitled to recover only such sum, not exceeding \$50, as the trial court or jury thinks proper under all the circumstances of the case. I am unable to find anything in the Act which justifies this interpretation.

In *Hall v. Chaltis* the majority opinion discussed this question, but I did not think such discussion necessary to the decision of that case. There, the question was whether the defendant, because of lack of notice or opportunity to acquire notice of the changed price schedule, had violated the Act. The trial

⁵ 31 A. 2d 699, 71 W. L. R. 349.

court had found, at least in effect, no violation, for it awarded no damages and gave judgment merely for the admitted overcharge. This court affirmed.

In the present case the excessive charge trebled was twelve cents and the purchaser sued for the statutory sum of \$50. The trial court found there was a violation and gave judgment for \$5. The sole question here is should the trial court have given judgment for \$50?

Section 205 (e) of the Act provides that if any person sells a commodity in violation of the price schedule, "the person who buys such commodity * * * may bring an action either for \$50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater." Leaving aside the treble amount of overcharge, the section mentions only one sum, namely, \$50, and nothing is said regarding judgment for a lesser sum.

The majority opinion in the Hall case, relied upon by the majority here, lays stress upon the words "bring an action," and says the bringing of an action is but the commencement of the suit and is conclusive of nothing. If we are to give the words of the statute this strained and restricted meaning, then logically we should hold that plaintiff had no right to prosecute her suit since the statute only gave her the right to commence it, and there is a well recognized difference between commencing a suit and prosecuting it after its commencement.^{5a}

13 In construing a legislative act, our primary purpose should be to ascertain the intention of the enacting body.⁶ We should assume that words in the statute are used in their usual and ordinary sense,⁷ and we should not attempt to ascertain their meaning by strict or strained interpretation of the words or by applying artificial canons of construction. If a doubt exists that doubt should be resolved in the light of the situation with reference to which it was enacted,⁸ and the policy intended to be served by the enactment.⁹

We have no power to make additions to the statute which we think Congress logically might have or should have made.¹⁰ Questions of policy, of the wisdom of the legislation, of the appropriateness of the remedy provided, are for the legislature and not for the courts.¹¹ Congress selects the sanction for the

^{5a} *Cohens v. Virginia*, 6 Wheat. 264, 408; *Wall v. C. & O. Railway Co.*, 290 Ill. 227, 125 N. E. 20; *Buecker v. Carr*, 60 N. J. Eq. 300, 47 A. 34.

⁶ *United States v. Rosenblum Truck Lines*, 315 U. S. 50, 53.

⁷ *Federal Housing Administration v. Burr*, 309 U. S. 242, 246.

⁸ *District of Columbia v. Murphy*, 314 U. S. 441, 449.

⁹ *United States v. Cooper*, 312 U. S. 600, 605.

¹⁰ *United States v. Cooper*, *supra*.

¹¹ *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 394.

law's enforcement,¹² and we must give full force and operation to the statute regardless of any hardship it may appear to work.¹³

The section here involved is found in the enforcement provisions of the Act. A similar provision was contained in H. R. 5479, entitled "Emergency Price Control Act of 1941," as originally introduced in the House of Representatives. After hearings on that bill the Committee directed the introduction of a new bill. The new bill, H. R. 5990, passed by the House, did not contain such a provision. At the hearings before the Senate Committee,¹⁴ the Administrator of the Office of Price Administration urged that the provision be restored to the bill as an aid in the enforcement of the Act, saying in part:

"As originally written, the bill provided that ultimate buyers (or in certain cases, the Administrator) might sue sellers for treble the amount of their overcharge, or for \$50 (whichever the greater) or for rescission of their contracts. The House bill struck out these provisions. The result is to deprive consumers of remedies which they require and to add greatly to the enforcement burden of the Office of Price Administration. They should be restored to the bill."

Among the Senate amendments was Section 205 (e). The Senate report¹⁵ stated:

"To discourage initial violations, the committee substitute provides for actions at law to recover \$50 or three times the amount of the illegal overcharges. This will permit private purchasers who buy for personal use or consumption, rather than in the course of trade or business, to protect themselves against violations of the act."

The bill as passed by the Senate was sent to conference and the conference report,¹⁶ referring to Section 205 (e), stated:

"The Senate amendment also contains a further provision, retained in the Conference Agreement, which permits a civil action by noncommercial consumers for treble the amount of any unlawful overcharge (or a minimum of \$50) made by any seller of any commodity subject to a price ceiling. The operation of this provision, however, is postponed until 6 months after the effective date of the bill."

I find nothing in the Act or its legislative history indicating that the action "for \$50" given the consumer is subject to the court's discretion of awarding a lesser sum.

¹² *Sunshine Anthracite Coal Co. v. Adkins*, supra, p. 401.

¹³ *Robinson v. Morrison*, 2 App. D. C. 105, 125.

¹⁴ Senate Hearings, p. 189.

¹⁵ Senate Rep. No. 931, 77th Cong., 2d Sess., p. 8.

¹⁶ H. R. Rep. No. 1658, 77th Cong., 2d Sess., p. 26.

It seems to me that this section imposes a penalty on violators as a means of enforcing the Act. While not a penal statute in the strict sense,¹⁷ it is penal in the sense that it imposes an extraordinary liability upon the wrongdoer in favor of the person wronged, not limited to the damages suffered.¹⁸ As I see it, the primary purpose of this section is to punish the seller charging more than the maximum price. The imposition of a penalty for the purpose of enforcing a statute is no new device.¹⁹ While the sum of \$50 contrasted with the overcharge

15 may seem large, we may assume that Congress had in mind the interest of the public to be protected, the numberless opportunities for violation, and the need for securing strict compliance with the price schedules.²⁰ To secure the cooperation of the public in enforcing the Act, Congress, it seems to me, fixed a minimum recovery, recognizing that the overcharge even when trebled in many cases would be so small that no effort would be made by the purchaser to obtain redress unless furnished some assurance of a minimum recovery.²¹ And it does not seem to me that Congress intended to encourage purchasers to bring actions by holding out to them the sum of \$50 and at the same time intended that sum could be reduced by the court according to its individual judgment of the proper amount to be awarded.²² If it intended that good faith, inadvertence, or mitigating circumstance of any kind should be taken into consideration in fixing the amount, such intention would surely have been expressed by appropriate language. The section expressly provides that attorney's fees and costs allowed in such actions shall be "reasonable" and "determined by the court."

The penal characteristics of the law do not require such a strict construction of it as will defeat the very object of the statute.²³ Even the rule of strict construction as applied to criminal statutes will be relaxed in interpretation of an act designed to declare and enforce a principle of public policy.²⁴

¹⁷ *Huntington v. Attrill*, 146 U. S. 657.

¹⁸ *O'Sullivan v. Felix*, 233 U. S. 318.

¹⁹ *Western Union Telegraph Co. v. Crovo*, 220 U. S. 364.

²⁰ *St. Louis, I. M. & S. R. Co. v. Williams*, 251 U. S. 63.

²¹ *Missouri Pacific Railway Co. v. Humes*, 115 U. S. 512.

²² Reference has been made throughout this opinion to the question of the discretion of the court because the instant case was heard by the trial court without a jury. Either party, however, in this and like cases, has the right to demand trial by jury. If the opinion of the majority is correct, in such cases the amount of the judgment would be left to the jury. Upon what basis would a jury determine the amount? As the Administrator pertinently asked in his brief, what instructions will the court give the jury on the question of damages?

²³ *Clark v. Barnard*, 108 U. S. 436.

²⁴ *District of Columbia v. Horning*, 47 App. D. C. 413, 423.

The majority opinion states that the violation in this case was the result of a mistake and was not done with an intention of violating the regulation. Section 205 (e), however, refers to a violation, and not an intentional violation. Criminal prosecutions under Section 205 (b) are limited to those who "wilfully" violate the Act, but I see nothing in 205 (e) which makes a distinction between intentional and unintentional violations. The appellee had ample notice of the price schedules and ample opportunity to take the necessary precautions to avoid violations. Congress has the power to declare an offense and to exclude the elements of knowledge and due diligence from any inquiry as to its commission.²⁵ It is for the legislature, and not for the court, to determine whether the public injury threatened is such as to justify an absolute and indiscriminate prohibition.²⁶

I can find nothing in the Act which gives the court, when a violation has been proved in an action under 205 (e), discretion in awarding any lesser sum than \$50. Perhaps there should be, but that is a matter for Congress and this court has no power, by way of judicial construction, to insert such a provision.

In my opinion, the judgment below should be reversed with instructions to enter judgment for the plaintiff in the sum of \$50.

17

Tuesday, June 8, 1943

The Court met pursuant to adjournment. Present: The Honorable WILLIAM E. RICHARDSON, Chief Judge, NATHAN CAYTON and ANDREW M. HOOD, Associate Judges.

* * * * *

No. 78

October Term, 1942

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, INTERVENOR-APPELLANT

vs.

AMERICAN STORES, INC., APPELLEE

Appeal from the Municipal Court for the District of Columbia,
Small Claims and Conciliation Branch

²⁵ Chicago B. & Q. Railway Co. v. United States, 220 U. S. 559, 578.

²⁶ Commonwealth v. Weiss, 139 Pa. 247, 21 A. 10.

Judgment

This cause came on to be heard on the transcript of the record from the Municipal Court for the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Municipal Court, in this cause, be and the same is hereby, affirmed.

WILLIAM E. RICHARDSON,
Chief Judge.

JUNE 8, 1943.

Dissenting opinion by ANDREW M. HOOD, Associate Judge.

* * * * *

18 The Municipal Court of Appeals for the District of
Columbia

I, C. Newell Atkinson, Clerk of the Municipal Court of Appeals for the District of Columbia, hereby certify the foregoing printed and typewritten pages, numbered from 1 to 17, inclusive, to be a true and correct copy of the transcript of record and proceedings in the case of Prentiss M. Brown, Administrator of the Office of Price Administration, Intervenor-Appellant, vs. American Stores, Inc., Appellee, No. 78, October Term, 1942, as the same remains upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 19th day of June A. D. 1943.

[SEAL]

C. NEWELL ATKINSON,
*Clerk of the Municipal Court of Appeals
for the District of Columbia.*

[Endorsement on cover:] No. 8551. Brown, Admr. v. American Stores, Inc. United States Court of Appeals for the District of Columbia. Filed June 19, 1943. Joseph W. Stewart, Clerk.

No. 8551 FILED SEP 25 1943

Joseph W. Turner
In the United States Court of Appeals for the
District of Columbia

CHESTER BOWLES

~~PRESTON M. BROWN~~, PRICE ADMINISTRATOR OF THE OFFICE
OF PRICE ADMINISTRATION, APPELLANT

v.

AMERICAN STORES, INC., APPELLEE

ON APPEAL FROM THE MUNICIPAL COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

APPELLANT'S BRIEF

GEORGE J. BURKE,

General Counsel,

THOMAS L. EMERSON,

Associate General Counsel,

FLEMING JAMES, Jr.,

Chief, Litigation Branch,

DAVID LONDON,

Head Appellate Section,

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**In the United States Court of Appeals for the
District of Columbia**

No. 8551

**PRENTISS M. BROWN, PRICE ADMINISTRATOR OF THE OFFICE
OF PRICE ADMINISTRATION, APPELLANT**

v.

AMERICAN STORES, INC., APPELLEE

***ON APPEAL FROM THE MUNICIPAL COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA***

APPELLANT'S BRIEF

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the Municipal Court of Appeals for the District of Columbia, affirming a final judgment of \$5.00 and costs entered by the Small Claims Court for the District of Columbia in a suit brought by Josephine McCorry for \$50 and costs pursuant to Section 205 (e) of the Emergency Price Control Act of 1942 (Act of January 30, 1942, c. 26, 56 Stat. 23, 50 U. S. C. App. Sec. 901 et seq.).

Jurisdiction of the cause was conferred on the Small Claims Court for the District of Columbia by Section 205 (e) of the Act, and by the Act of March 5, 1938, Sec. 4, c. 43, 52 Stat. 103, defining the jurisdiction of the Small Claims Court. The jurisdiction of the Municipal Court of Appeals for the District of Columbia was conferred by Sec. 7 (a) of the Act of April 1, 1942, c. 207, 56 Stat. 190. The jurisdiction of this court is conferred by Section 8 of the Act of April 1, 1942, c. 207, 56 Stat. 190.

PROCEEDINGS BELOW

The Plaintiff, Josephine McCorry, filed a complaint in the Small Claims and Conciliation Branch of the Municipal Court for the District of Columbia on November 19, 1942. Trial was held on March 13, 1943, and judgment entered for \$5 and costs. At the beginning of the trial the Administrator of the Office of Price Administration was granted leave to intervene and become a party to the proceedings.

The Intervenor-Administrator applied to the Municipal Court of Appeals for allowance of an appeal from the decision of the trial court. This application was granted on March 24, 1943. On June 8, 1943, the Municipal Court of Appeals affirmed the judgment of the trial court in *Brown v. American Stores*, 31 A. (2d) 388 (1943).

The Administrator applied to this court for allowance of an appeal from the adverse decision of the Municipal Court of Appeals on June 16, 1943. This court granted the application on August 16, 1943.

STATUTES AND REGULATIONS INVOLVED

This case involves Section 8 of the Act of April 1, 1942, c. 207, 56 Stat. 190, 196, which defines those parties who may petition this court to review a judgment of the Municipal Court of Appeals; the Emergency Price Control Act of 1942, 56 Stat. 23, 50 U. S. C. App. § 901 et seq., hereinafter called the Act; and the General Maximum Price Regulation (7 Fed. Reg. 3153) issued thereunder.

Section 8 of the Act of April 1, 1942 provides as follows:

Any party aggrieved by any judgment of the Municipal Court of Appeals for the District of Columbia may seek a review thereof by the United States Court of Appeals for the District of Columbia by petition for the allowance of an appeal.

Sec. 205 (d) of the Emergency Price Control Act provides as follows: “* * * In any suit or action wherein a party relies for ground of relief or defense upon this Act or any

regulation, order, price schedule, requirement, or agreement thereunder, the court having jurisdiction of such suit or action shall certify such fact to the Administrator. The Administrator may intervene in any such suit or action."

Section 205 (e) of the same Act reads as follows:

If any person selling a commodity violates a regulation, order or price schedule, prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action for \$50 or treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court.

The General Maximum Price Regulation, issued under Section 2 of the Act became effective as to retailers such as the defendant on May 18, 1942. The regulation insofar as pertinent reads as follows:

(a) *Prohibition against dealing in commodities or services above maximum prices.* On and after the effective date of this General Maximum Price Regulation, regardless of any contract or other obligation:

"(a) No 'person' shall 'sell' or deliver any 'commodity' * * * at a price higher than the maximum price permitted by this General Maximum Price Regulation * * *"

(b) *Maximum Prices for commodities and services; general provision.* Except as otherwise provided in this regulation, the "sellers" maximum price for any commodity or service shall be:

"(a) The highest price charged by the seller during March 1942."

STATEMENT OF THE CASE

The plaintiff brought this action in the Small Claims and Conciliation Branch of the Municipal Court for the District of

Columbia to recover the sum of \$50 from the defendant. The action is predicated on Section 205 (e) of the Act, and was based upon an alleged overcharge in the sale of a can of Campbell's Soup by the defendant. Prior to trial, Prentiss M. Brown, Administrator of the Office of Price Administration, was granted leave to intervene and thereby became a party to said action. Trial of the issue was had on March 13, 1943.

The plaintiff, by competent evidence, established a sale by defendant to the plaintiff on November 14, 1942, of a can of soup for 14¢, the price marked on the top of the can. The uncontradicted evidence established that the maximum price for such commodity fixed and promulgated by the Price Administrator on April 28, 1942, by the General Maximum Price Regulation and amendments thereto, as authorized by the Act, was 10¢. A witness, one Ross Perry, corroborated plaintiff's testimony.

The defendant offered evidence to the effect that about a month before the sale in question, "Campbell's Soups" had begun distribution of a new can of soup on which the retail ceiling and sales price was 14¢. Further evidence was introduced by defendant revealing that the "new" and "old" style soups were kept on the same shelf, tending to show that any improper marking on the can in question was a mistake, and that the defendant had no intention to violate the Act.

The Small Claims Court, after considering the evidence, found that there had been a sale at 14¢, that the maximum price was 10¢, and that such a sale constituted a violation of the Act. The Court, over the objection of plaintiff and intervenor, awarded the plaintiff \$5.00 rather than the sum of fifty dollars (\$50.00) which plaintiff had asked pursuant to Section 205 (e) of the Act.

The Price Administrator applied to the Municipal Court of Appeals for the District of Columbia for the allowance of an appeal from this judgment. The application was granted on March 24, 1943. On June 8, 1943, the Municipal Court of Appeals affirmed the judgment of the lower court, Judge Hood dissenting.

The Administrator applied to this court for the allowance of an appeal from this decision, which was granted August 16, 1943.

STATEMENT OF POINTS

The points on which the Administrator intends to rely are:

1. The Administrator is a proper party to this appeal.
2. The Municipal Court of Appeals erred in affirming the judgment of the trial court which allowed a recovery of \$5 and costs rather than \$50 and costs as provided by Section 205 (e) of the Act.

SUMMARY OF ARGUMENT

I. The Administrator is a proper party to this appeal as a "party aggrieved" by the judgment of the Municipal Court of Appeals.

II. In a consumer action under Section 205 (e) of the Act, judgment for the statutory measure of recovery, fifty dollars (\$50) or treble the amount of the overcharge, whichever is the greater, is mandatory upon a finding that there has been a price violation. This construction is required by:

1. The language of the Act.
2. The purposes underlying the enactment of Section 205 (e) and other parts of the Act.
3. The legislative history of Section 205 (e).
4. Similar construction given to similar statutes.

ARGUMENT

I

The Administrator is a proper party to this proceeding

The Municipal Court admittedly had jurisdiction to entertain the action brought by the original plaintiff, [11 District of Columbia Code, Secs. 804, and 703, Sections 205 (c) and (e) of the Emergency Price Control Act of 1942] and the Administrator clearly had the right to intervene in, and become the party to the action under Section 205 (d) of the Act, and in fact did so.

Whether the Administrator was entitled to appeal to the Municipal Court of Appeals and to seek a review by this court

depends solely on the interpretation to be placed on the applicable statutes.¹

Section 7 (a) of the Act creating the Municipal Court of Appeals (Act of April 1, 1942, 56 Stat. 190, Ch. 207) provides that:

Any party aggrieved by any final order or judgment of the Municipal Court for the District of Columbia—may appeal therefrom as of right to the Municipal Court of Appeals for the District of Columbia.

Section 8 of the same Act provides that:

Any person aggrieved by any judgment of the Municipal Court of Appeals for the District of Columbia may seek a review thereof by the United States Court of Appeals for the District of Columbia for the allowance of an appeal. [Emphasis supplied.]

The Administrator's right to appeal to the Municipal Court of Appeals and to seek a review by this Court depends, therefore, entirely on whether or not he is "a party aggrieved" by the judgments of the courts below within the meaning of the two sections last quoted. That he is such a party is clear.

The judgments were contrary to the construction of the Emergency Price Control Act urged by the Administrator. The courts in effect decided the case against him. He is, therefore, a party aggrieved by the judgment unless he does not have sufficient interest in the matter to give him a standing to appeal, and he plainly has such an interest.

The purpose of the Emergency Price Control Act is not to protect or advance the interests of tenants or buyer or any

¹ Both of the courts below, as shown by the fact that their judges do not hold office during good behavior but for fixed terms of years, are purely statutory courts. Likewise this court, while both a Constitutional court and a statutory court, does not exercise the judicial power of the United States in reviewing judgments of the courts below. Therefore it is unnecessary to consider whether the cause is at this stage of the proceeding a case or controversy within the meaning of Article III of the Constitution. *Ex parte Bakelite Corp.*, 279 U. S. 438, 460 (1929); *Keller v. Potomac Electric Power Co.*, 213 U. S. 138 (1909); *Federal Radio Commission v. Gen. Electric Co.*, 281 U. S. 464 (1930); *Butterworth v. United States Ex Rel.* 112 U. S. 50 (1884); *Frasch v. Moose*, 211 U. S. 1 (1909); *Atkins v. Moore*, 212 U. S. 285 (1909).

other class, but to protect the public at large from the consequences of inflation resulting from war. (Sen. Rept. No. 931, 77th Cong., 2d Sess. (1942), *Brown v. The Hecht Company* (App. D. C., July 22, 1943). Whatever private rights are created are merely incidental consequences of that primary purpose. The Administrator, as we have said, intervened in the action pursuant to the provisions of Section 205 (d) of the Act. That section was "enacted to protect the public interest in all litigation affecting the price control program." (Statement of Chairman of House Committee on Banking & Currency, 87 Cong. Rec. 9074). It is to the public interest that the Act be correctly interpreted and properly enforced. This is particularly true of Section 205 (e) of the Act. That section was enacted primarily "to relieve the Government of a part of the burden of enforcement and to deter initial violations." (Sen. Rept. No. 931, 77th Cong., 2d Sess. (1942), p. 9). The public interest in the construction and enforcement of the Section equals or outweighs the interest of the parties in whose favor the Section creates a cause of action. The interest in the proper construction and enforcement of a law designed not to foster or protect private interests, but to protect the interest of the public at large is enough to give the agency or officer charged with its administration a standing to appeal.

Thus in *Securities & Exchange Com'n v. United States Realty & Improvement Co.*, 310 U.S. 434 (1940) the Securities & Exchange Commission intervened in proceedings brought by a corporation under Chapter XI of the Bankruptcy Act to effect an adjustment of its unsecured debts and moved to dismiss the proceedings on the ground that the Bankruptcy Act should not be construed to authorize the proceedings in the circumstances under which they were brought. In upholding the commission's right to appeal the Supreme Court said:

If as we have said, it was the duty of the court to dismiss the Chapter XI proceedings because its maintenance would defeat the public interest in having any scheme of reorganization of respondent subjected to the scrutiny of the commission we think it plain that the commission has a sufficient interest in the maintenance

of its statutory authority and the performance of its public duties to entitle it through intervention to prevent reorganizations which should rightly be subjected to its scrutiny from proceeding without it * * *

The commission therefore was, a party aggrieved by the court's order refusing to dismiss and was entitled to appeal under sections 24 and 25 of the Bankruptcy Act, 11 U. S. C. 47, and 48.

In *Interstate Commerce Com'n v. Oregon-Washington, R. Co.*, 288 U. S. 14 (1933), the company initially sought to enjoin the United States from enforcing an order of the Interstate Commerce Commission compelling the company to extend its line. The Interstate Commerce Commission as well as the Public Utilities Commissions of Oregon and Idaho intervened as party-defendants with the United States, and presented argument along with the United States against the proposed injunction. From an adverse decision, the three commissions alone appealed to the United States Supreme Court and obtained a reversal of the lower court's decision. The Supreme Court, in answer to the contention that three commissions had no standing to appeal, held them to be "aggrieved parties," saying (at p. 24 of 288 U. S.).

The court below decided adversely to all these bodies. They are aggrieved parties granted a review by section 2; the Interstate Commerce Commission for the reason that the decree set aside its order, the state commissions because they officially represent the interest of their states in obtaining adequate transportation service.

In *Coleman v. Miller et al.*, 307 U. S. 433 (1939) (at pp. 441-2 of 307 U. S.), in discussing what legal interest is sufficient to satisfy the appellate jurisdiction of the Supreme Court, that Court said:

But there has been recognition of the legitimate interest of public officials and administrative commissions, federal and state, to resist the endeavor to prevent the enforcement of statutes in relation to which they have official duties. Under the Urgent Deficiencies Act, the

Interstate Commerce Commission, and commissions representing interested States which have intervened, are entitled as "aggrieved parties" to an appeal to this court from a decree setting aside an order of the Interstate Commerce Commission, though the United States refuses to join in the appeal. *Interstate Commerce Commission v. Oregon-Washington R. & N. Co.* * * *

Courts have not limited their recognition of a public interest as affording sufficient standing to appeal to government agencies or officials as proper representatives of public interest. In certain cases private parties have been permitted by statute to appeal from orders of governmental agencies, as representatives of the public interest although they themselves had no legal rights.

Thus the Federal Communications Act of 1934, 47 U. S. C. A. § 402 (b), 48 Stat. 1064, 1093, provides for an appeal from its decisions by persons "aggrieved or whose interests are adversely affected by commission action." In *Scripps Howard Radio v. Fed. Communications Com'n*, 316 U. S. 4 (1942), the Supreme Court described the legal interest necessary to give a private litigant a "Standing to appeal as follows (at p. 14 of 316 U. S.):

"The Communications Act of 1934 did not create new private rights. The purpose of the Act was to protect the public interest in communications. By § 402 (b) (2), Congress gave the right to appeal to persons 'aggrieved or whose interests are adversely affected by commission action' . . . *But these private litigants have standing only as representatives of the public interest. [Italics added.]* See also *Federal Communications Com'n v. Sanders*, 309 U. S. 470, 477, 642; 60 S. Ct. 693, 698; 84 L. Ed. 869, 1037."

See also: *Associated Industries v. Ickes*, 134 F. (2d) 694 (C. C. A. 2d 1943); *Saxton Coal Mining Co. v. National Bituminous Commission*, 68 App. D. C. 245, 96 F. (2d) 517.

The Administrator's right to appeal is not to be determined by whether he was entitled to institute the suit in the first instance. That test was definitely rejected by this court in *Yankee Network v. Fed. Communication*, 71 App. D. C. 11,

107 F. (2d) 212 (1939). Until the suit was instituted, the public interest in obtaining a proper construction and enforcement of the statute in the action was not affected. When the Court was called upon to construe the act the Administrator's right to be heard arose. Just as the Administrator had the right to be heard in the trial court, so he has a right to be heard here. An appeal is not a new suit in the appellate court but a continuation of the suit in the court below. *Gulf Refining Co. v. United States*, 269 U. S. 125, 137 (1925).

It is submitted that since the Administrator is clearly a party aggrieved by the judgments of the courts below, he is a proper party to this appeal.

II

In a consumer action under section 205 (e) of the Act, judgment for the statutory measure of recovery, fifty dollars (\$50.00) or treble the amount of the overcharge, whichever is the greater, is mandatory upon a finding that there has been a price violation.

The Small Claims Court for the District of Columbia, awarded the plaintiff \$5.00 and costs, rather than the fifty dollars (\$50.00) sued for pursuant to Section 205 (e) of the Act. That judgment necessarily rests upon a finding that the sale to the plaintiff constituted a violation of the General Maximum Price Regulation and of the Act. If there had been no such violation, the trial court would have given judgment for the defendant. Accordingly, the issue is whether a court has discretion to award judgment for less than the statutory measure of damages (\$50.00 or treble the amount of the overcharge, whichever is the greater), if a violation has been proved.

1. The language of the Act

Section 205 (e) of the Act provides that if any person sells a commodity in violation of a price schedule "the person who buys such commodity * * * may bring an action either for \$50 or for the treble amount which the consideration exceeded the applicable maximum price, whichever is the greater." The

court below, in holding this Section to be merely discretionary construed the words "bring an action" as authorizing only the bringing of suit, and that therefore the trial court was not deprived of its discretion to enter a judgment for any amount up to \$50.00 or treble the overcharge as the case might be.² It is the contention of the appellant, charged with administration of the Act, that there is nothing in the language of Section 205 (e) to support such a strained construction. Aside from the provision for treble damages, the section mentions only one sum, namely \$50, and no provision is made for a judgment for a lesser sum. The use of the phrase "whichever is the greater" establishes the mandatory nature of this Section. . This latter language would be rendered meaningless if it permitted a judgment for less than \$50.00. If Congress intended \$50 or treble damages to be a maximum rather than an invariable minimum, the quoted phrase would be completely superfluous.

2. The intent of Congress as revealed by the purposes underlying the enactment of Section 205 (e) and the Act, and the legislative history of Section 205 (e)

However, if any doubt exists, that doubt should be resolved in the light of the situation with reference to which Section 205 (e) and the Act were designed to meet, and the policy intended to be served by their enactment. See *Ozawa v. United States*, 260 U. S. 178 (1922). In the ascertainment of the intent of Congress, the legislative history is always relevant, and where clearly and convincingly expressed, the courts must give full effect to it. See *United States v. Dickerson*, 310 U. S. 554, (1940); *United States v. American Trucking Co.*, 310 U. S. 534 (1940); and *Harrison v. Northern Trust Co.*, 63 S. Ct. 361 (1943). An examination of the purposes underlying the enactment of the Act and Section 205 (e) thereof, as well as the legislative history of Section 205 (e), clearly demonstrate that Congress intended that Section to be mandatory in character.

² The majority opinion of the Court below relied on the previous case of *Hall v. Chaltis*, 71 W. L. R. 349, 31 A (2d) 699, (1943) decided by the same court, and holding in a case similar to this that Section 205(e) is not mandatory.

a. The purposes of Section 205 (e) and of the Act

The primary purpose of the Act is to protect the public from the destructive effects of skyrocketing inflationary prices. To effectuate the purposes leading to the adoption of the Act, Congress provided adequate enforcement sanctions, including injunction suits to be brought by the Administrator (Sec. 205 (a)), criminal prosecution (Sec. 205 (b)), and license suspension proceedings (Sec. 205 (f)). But Congress realized that no enforcement staff of reasonable size could adequately insure the observance on the part of retailers of the ceilings on their many commodities. To meet the necessities of effective enforcement, the treble damage section, (Sec. 205 (e)) was created, which would enlist the aid of consumers in the enforcement program and would give them a speedy and efficient remedy against oppressive demands. In other words, the consumer has become an enforcement agent of the stabilization program by offering him a tangible incentive to act in that capacity. For the Administrator, as a practical matter, is unable to discover and prosecute, by means of the remedies given to him by the Act, all of the violations occurring in the countless daily transactions on the retail level.³ This legislative purpose is well illustrated by an excerpt from the Senate Committee Report on this subsection (Sen. Rep. No. 931, 77th Cong., 2d Sess., at p. 8):

To discourage initial violations, the committee substitute provides for actions at law to recover \$50 or three times the amount of the illegal overcharges. This will permit private purchasers who buy for personal use or consumption, rather than in the course of trade or business, to protect themselves against violations of the Act.

The importance of consumer participation in the enforcement of the Act has been further highlighted by the "hold-the-line" order of the President (8 Fed. Reg. 4681, April 10, 1943), and by the initiation of community wide price ceilings

³ Sec. 205 (e) vests the statutory damage suit in the Administrator, where the consumer purchases for use or consumption in his trade or business; or is barred for any other reason. This provision generally covers the wholesale rather than the retail level.

to enable consumers to better ascertain the correct applicable ceiling price.

This deterrent purpose, however, could not be accomplished if the recovery of the statutory liquidated damages were not mandatory. Provision for the recovery of a sum sufficiently substantial to warrant suit at the instance of persons forced to pay amounts in excess of legal maxima is necessary to protect their legal rights. Such persons must have an incentive to bring suit as well as some protection against the dissipation of modest recoveries through loss of time and money by court attendance. It is self-evident that Congress intended the remedy to be an effective one. It is also evident from the very nature of the Section and from its legislative history that Congress understood that such effectiveness could not be attained without assurance to the consumer that some substantial sum would be recoverable.* Unless this sanction is made available and effective, the express purpose of Congress in creating it is thwarted, and the sanction is in effect destroyed.

* The efficacy of consumer-tenant suits is well illustrated by the many reported cases giving full effect to the intent of Congress. All reported cases, except the two in the District of Columbia and less than 6 unreported cases, have given \$50 for each violation of the Act. See *Regan v. Kroger Grocery Co.*, Municipal Court of Chicago, Ill., 1943, OPA Service 620:112 (recovery of \$100 for two over-the-ceiling sales of soup); *Hutkiewicz v. Great Atlantic and Pacific Tea Co.*, Civil Court, Milwaukee County, Wis., 1943, OPA Service 620:136 (recovery of \$50 for one sale in violation of the Act); *Whatley v. Love*, City Court of New Orleans, La., 1942, OPA Service 622:46 (\$50 recovery for one monthly rental at over the applicable ceiling); *Pratt v. Hollenbeck*, Common Pleas Court, Erie County, Pa., 1943, OPA Service 622:109 (recovery of \$850 for seventeen overcharges of rent); *Walters v. Melavas*, District Court of Orange, N. J., 1943 OPA Service 622:91 (recovery of \$100 for two overcharges of rent); *Egling v. Lombardo*, City Court of Rochester, N. Y., 1943, OPA Service 622:129 (\$250 recovered for five overcharges of rent); *Kelly v. Graham*, Circuit Court, Oregon, 1943 (recovery of \$300 for six overcharges of rent); *Lapinski v. Copacino* Common Pleas Court, Conn., 1943, OPA Service 622:1733 (\$350 recovery for seven monthly violations of the rent ceiling); *Hermanson v. Kosin*, Superior Court of King County, Washington, 1943, OPA Service 622:200 (recovery of \$240 for four months overcharge consisting of treble the amount of the overcharge which was \$20 per month); and *Childs v. Cruise*, Superior Court of Los Angeles County, Calif., 1943, OPA Service 620:90 (dictum that Section 205 (e) is mandatory).

b. The legislative history of Section 205 (e)

Reference to the legislative history of Section 205 (e) strikingly demonstrates the intent of Congress that, in suits to recover \$50 or treble damages, a court has no discretion to give less if a violation has been shown.

The original Price Control Bill, H. R. 5479, contained a provision similar to the present Section 205 (e), but after initial hearings on this bill, the Committee directed the introduction of a new bill. The new bill, H. R. 5990, passed the House without the treble-damage provision which had been deleted from the bill by the House Committee. The Senate Committee on Banking and Currency then took up consideration of the bill on December 9, two days after Pearl Harbor. As the Committee said in reporting the bill to the Senate on January 2, 1942:

... what was before a moderate program of rearmament and friendly aid is now unlimited national mobilization in a war for survival * * * [the House Bill] * * * must be considered in the light of these changed conditions * * * the committee has sought to strengthen it [the House Bill] * * * [and] * * * regards prompt enactment of this stronger bill as imperative to the safety of our country.⁵

One of the provisions of importance to the strengthening of the proposed bill was the restoration of the consumer treble-damage provision, at the urgent request of the Administrator of the Office of Price Administration, who said in a written statement:

As originally written, the bill provided that ultimate buyers (or in certain cases, the Administrator) might sue sellers for treble the amount of their overcharge, or for \$50 (whichever the greater) or for rescission of their contracts. The House Bill struck out these provisions. The result is to deprive consumers of remedies which they require and to add greatly to the enforcement bur-

⁵ Senate Report on H. R. 5990 (the subsequently enacted Emergency Price Control Act), S. Rept. 931, 77th Cong., 2d Sess. (1942), at pp. 1-6 hereafter called the "Senate Report."

den of the Office of Price Administration. They should be restored to the Bill.*

The statement also made reference to the provisions of the District of Columbia Rent Act,⁷ which provides in case of an overcharge by the landlord for the *bringing of an action* by the tenant for double the amount of the overcharge or \$50, whichever may be the greater. In construing this language, so closely resembling Section 205 (e) of the Emergency Price Control Act, the memorandum states (at p. 189 of the Senate Hearings):

Section 10 (a) of the District of Columbia Rent Act recently enacted by the Congress provides for similar remedies. [Similar to those found in the subsequently enacted treble damage section of the Price Control Act.] Illegal leases may be rescinded or there may be *double recovery of the overcharge*, with a *minimum recovery* of \$50 plus reasonable attorneys fees. [Emphasis added.]

This quotation clearly indicates the intention of the Administrator in asking for the creation of this remedy . . . that the language of the section on consumer damage suits requires that the consumer (or the Administrator in certain cases) recover \$50 or treble damages, whichever is the greater, if a violation has been proved.

This intention is confirmed by the statement of the Senate Committee, which, in reporting out the Price Control Bill said (at p. 8 of the Senate Report):

To discourage initial violations, the committee substitute provides for actions at law *to recover \$50 or three*

* Senate Hearings on H. R. 5990, 77th Cong., 1st Sess. (1941), at p. 189, hereafter called the "Senate Hearings."

⁷ The District of Columbia Rent Act, 55 Stat. 794 (1941) reads as follows: "If any landlord receives rent or refuses to render services, in violation of any provision of this Act * * * the tenant paying such rent or entitled to such service * * * may bring suit to rescind such lease or rental agreement * * * [and may bring] in case of the violation of a maximum rent ceiling, an action for double the amount by which the rent exceeded the applicable rent ceiling, and in case of violation of a minimum service standard an action for double the value of the services refused in violation of the applicable minimum service standard, or \$50 whichever is greater in either case plus reasonable attorneys fees * * *."

times the amount of the illegal overcharges. [Emphasis added.]

A similar statement is found at p. 9 of the same report, where the Committee said:

An action of this sort [referring to a consumer suit provided by Section 205 (e)] may be brought by any person who buys for use or consumption other than in the course of trade or business, *to recover from the seller who violates a price regulation, or price schedule, damages in the sum of \$50 or treble the amount of the unlawful overcharge.* Reasonable attorney's fees and costs are to be allowed by the court to a buyer who prevailed in such a suit. [Emphasis added.]

The bill as passed by the Senate was sent to conference and the Conference Report,⁸ referring to Section 205 (e), stated:

The Senate amendment also contains a further provision, retained in the Conference Agreement, which permits a civil action by noncommercial consumers for treble the amount of any unlawful overcharge (*or a minimum of \$50*) made by any seller of any commodity subject to a price ceiling. [Emphasis added].

These quotations state as clearly as possible that it was the intent of Congress that *recovery* shall be for \$50 for treble the amount of the overcharge, whichever is the greater. Our position represents no attempt to extend an ambiguous position by implication, for conclusive statements made by the enacting authority—Congress—as to its intent relative to the mandatory nature of Section 205 (e) clearly show such intent. We therefore respectfully submit that this court should follow and give effect to the clearly expressed intent of Congress as revealed by this significant legislative history.

3. Provisions of similar statutes

The Administrator also contends that if Congress had desired to make the amount of the recovery discretionary, Congress would have used appropriate language to effectuate such

⁸ H. Rep. No. 1658, 77th Cong., 2d Sess., (1942) at p. 28.

an intent. Section 203 (b) of the Act is an example of this. Section 203 (b) reads as follows:

Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed * * * shall, upon conviction thereof, be subject to a fine of *not more than \$5,000* * * * [Emphasis supplied.]

The emphasized language of this Section of the Act quoted above clearly empowers the court to exercise the type of discretion which the court below read into Section 205 (e). Such language is notably absent in Section 205 (e). This omission tends to rebut any contention that discretion is permissible in actions based upon Section 205 (e).

Discretionary language is likewise found in the Patent Infringement Act of 1870, Sec. 59, 16 Stat. 207, 35 U. S. C. § 67, which provides:

Damages for the infringement of any patent may be recovered by action on the case * * * and whenever in any such action a verdict is rendered for the plaintiff, *the court may enter judgment thereon for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case*, not exceeding three times the amount of such verdict together with costs. [Emphasis supplied.]

The Patent Infringement Act clearly grants discretion to a court in the assessment of damages. Congress, in two later statutes, carefully used language identical with the Patent Infringement Act. See Act of February 20, 1905, c. 592, § 16; 33 Stat. 728; 15 U. S. C. 96; and Act of March 19, 1920, c. 104, § 4; 41 Stat. 534; 15 U. S. C. 124.

Reference to Section 16 (b) of the Fair Labor Standards Act, c. 676, § 1; 52 Stat. 1060; 47 U. S. C., § 201, is also valuable in this analysis.* While the language of Section 16 (b) is not

* This section provides that an employer "shall be liable to the employee or employees affected in the amount of his unpaid minimum wages or his unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." This has been held mandatory. See *Overnight Transportation Co. v. Missel*, 316 U. S. 572 (1942).

identical to that used in Section 205 (e) of the Emergency Price Control Act, these two sections are completely alike in practical effect. The similarity in purpose of these two sections convincingly demonstrates that Congress intended Section 16 (b) of the Fair Labor Standards Act to serve as direct precedent for Section 205 (e) of the Emergency Price Control Act. The legislative history of Section 205 (e) shows that the consumer action for treble damages was intended to have the same effect and to serve the same role in the enforcement of the price control program that employee suits for double damages had served in the enforcement of the maximum hour and minimum wage program. On this point see the discussion at page 191 of the Senate Hearings on H. R. 5990 (The Price Control Bill) 77th Cong., 1st Sess. (1941):

In the one *related* field in which we have adequate statistical data—the enforcement of the Fair Labor Standards Act—a provision such as the one contemplated (i. e. the treble damage section of the Price Control Bill) has been shown to be highly effective . . . It is clear that the enforcement of the Fair Labor Standards Act would have been vastly more expensive to the Government—if indeed it could have been enforced to any extent whatsoever—without the provision which put a civil remedy into the hands of private citizens. [Emphasis supplied.]

See also S. Rep. No. 931, 77th Cong., 2d Sess., p. 9; and House Hearings on H. R. 5479 (the predecessor of the bill which became the Price Control Act) 764, 765.

In view of the legislative history and complete similarity in purpose of these two damage provisions, it is our considered position that Congress intended the liquidated damages authorized by Section 205 (e) of the Price Control Act to be mandatory.

The attention of the court is also directed to the relevant portions of the Interstate Commerce Act, C. 104 §1, 24 Stat. 379, 49 U. S. C. §1 et seq., which provide for the bringing of a dam-

age action by the injured shipper against the offending carrier in the following language:

In case any common carrier * * * shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act . . . required to be done . . . *such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained . . . together with reasonable counsel or attorney's fees.* [Emphasis supplied.]

By the Interstate Commerce Act, the Interstate Commerce Commission has been delegated the duty and power to prescribe reasonable rates which represent a maximum which the carrier may exact, without rendering himself liable to the shipper for the damages provided by Section 8 *supra*. Likewise, under the Emergency Price Control Act there has been delegated to the Price Administrator the authority to set reasonable maximum prices; it is there further provided that if a vendor sells for an amount in excess of the established maximum price, the injured purchaser may sue for the statutory damages provided by Section 205 (e) of the Emergency Price Control Act.

By Section 8 of the Interstate Commerce Act, however, no measure of damages is provided; that statute by its express terms, only gives the shipper a right of action for the damages flowing from the wrongful act of the carrier. These damages are usually the difference between the tariff schedule approved by the Commission and the amount of the exaction levied by the carrier over and above that tariff, plus such consequential damages as the shipper may be able to prove. See *Texas & Pac. R. Co. v. Abilene Cotton Co.*, 204 U. S. 426 (1907). This recovery is substantially the same as that afforded by the common law action in assumpsit to recover back excessive charges collected by the carrier. See *Robinson v. B. & O. R. Co.*, 64 W. Va. 406, 63 S. E. 323 (1908).

If Congress had desired to give courts discretion in determining the amount of damages, such a provision as that represented by the Interstate Commerce Act might well have been

used. It is significant that this method of computing damages was not employed. It is likewise apparent why such a method was not followed. The amount of an overcharge in a case arising under the Emergency Price Control Act insofar as a consumer purchase is concerned, will usually be very small. In the instant suit the overcharge was only \$.04. The consequential damages cannot be definitely ascertained. Faced with such a situation, what could be more reasonable than the grant of a flat sum recovery of fifty dollars (\$50.00) as liquidated damages?

If Congress had intended that courts or juries should fix the amount of damages in accordance with the facts of a given case, language similar to that of the Interstate Commerce Act, or the Patent Infringement Act, would surely have been used. Or, Congress might simply have declared that a sale above the maximum ceiling should constitute a violation, and relegate the injured purchaser to a common law recovery.

In this connection it is difficult to determine on what grounds the Small Claims Court could justify the award of five dollars (\$5.00) for plaintiff in the instant case. The overcharge was only four cents (\$.04), and no consequential damages were alleged or proved. The Small Claims Court was apparently in error in awarding \$5.00, since it is clear that where a statute sets a ceiling on the amount of the recovery, or merely provides for the bringing of a damage action (see the Interstate Commerce Act), the measure of damages is restricted to actual damages, plus, perhaps, whatever consequential damages may be proved. See *McCune v. Baltimore & Ohio R. Co.*, 154 Fed. Rep. 63, 64 (C. C. A. 3rd, 1907) (Patent Infringement Act); and *Texas and Pac. R. Co. v. Abilene Cotton Co.*, 204 U. S. 426 (1907) (Interstate Commerce Act). See also the judgment for \$.85 awarded in *Hall v. Chaltis*, *supra*, the exact amount of the overcharge.

What relation is there in the instant case between the overcharge of \$.04, and the judgment of \$5.00? Was there any evidence of specific actual damage other than \$.04? If a jury trial (to which either party has a right) should be demanded, what instructions will the court give the jury on the question

of damages? Are not the foregoing some of the doubts that Congress sought to remove, and some of the complexities it desired to avoid by fixing the recovery at \$50?

It is therefore respectfully submitted that the legislative history of Section 205 (e) as well as the purposes of the Act as a whole, conclusively dispels any doubts of Congressional intent as to the amount of the recovery which should be granted in this case. As was said by this court in the recent case of *Brown v. The Hecht Company*, OPA Service 620:156, decided July 22, 1943: "It (the Act) is a public regulation of great scope and importance. Innocent non-conformity with the Price Control Act is as inflationary and as damaging to competitors and the public as guilty nonconformity." See also *United States v. Balint*, 258 U. S. 250 (1922). The Administrator motivated by the most urgent considerations relating to the consumer enforcement program earnestly petitions this court to hold that Section 205 (e) grants a mandatory recovery of \$50 or of treble the overcharge, whichever is the greater.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

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APPELLEE'S BRIEF

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED OCT 15 1943

IN THE *Joseph W. Stewart*

United States Court of Appeals ^{CLERK}

FOR THE DISTRICT OF COLUMBIA

No. 8551

~~CHESTER BOULES~~
~~PRENTISS M. BROWN~~, PRICE ADMINISTRATOR OF
THE OFFICE OF PRICE ADMINISTRATION, *Appellant*

v.

AMERICAN STORES, INC., *Appellee.*

On Appeal from the Municipal Court of Appeals for the
District of Columbia.

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 8551.

PRENTISS M. BROWN, PRICE ADMINISTRATOR OF
THE OFFICE OF PRICE ADMINISTRATION, *Appellant*

v.

AMERICAN STORES, INC., *Appellee*.

On Appeal from the Municipal Court of Appeals for the
District of Columbia.

APPELLEE'S BRIEF.

COUNTER STATEMENT OF THE CASE.

This case arose in the Small Claims and Conciliation Branch of the Municipal Court for the District of Columbia, Civil Division, by virtue of a complaint filed by Josephine McCorry, 1727 Massachusetts Avenue, N. W., Washington, D. C., plaintiff, on November 19, 1942, Case No. C-106493. The complaint alleged that the plaintiff had purchased a can of Campbell's soup at a store of respondent, American

Stores, Inc., located at 17th and Corcoran Streets, N. W., on November 14, 1942 and had been charged 14c therefor, the maximum price for such canned soups having been established by the Price Administrator under the Emergency Price Control Act¹ and by the General Maximum Price Regulation promulgated April 29, 1942 and amendments thereto, as 10 cents a can.

Trial of the issue was had on March 13, 1943 in the Small Claims and Conciliation Branch of the Municipal Court for the District of Columbia. The evidence adduced was as follows:

(a) On November 14, 1942, the plaintiff purchased a can of so-called "old style" Campbell's soup, the sale price for which was 10 cents per can and for which she was charged 14 cents. She had no sales slip or other evidence to corroborate her statement that the can was purchased in the respondent's store. She did, however, have a friend and witness, one Ross Perry, who testified to the fact of the purchase on that date and corroborated her testimony in that respect.

(b) The can had marked on its top surface the crayon marking "14". The respondent's District Manager stated that the marking was similar to that used in their stores. Conclusive evidence was adduced with respect to the posting of ceiling prices throughout the store, even the plaintiff's witness Perry, admitting this to be true, and the placing of proper markers on the shelves indicating the prices of the articles placed thereon. Evidence was adduced which showed that the crayon marking on the can indicating the price for the article was for the assistance of the cashier in adding the purchases made by a consumer and arriving at the total owing and due.

(c) Evidence was adduced which showed that approximately four weeks before the sale in question, Campbell's Soups had commenced the distribution of a new can of soup called "New Recipe" on which by virtue of Maximum Price Regulation 191, effective July 18, 1942, the ceiling and sales price was 14¢. Evi-

¹ Act of January 30, 1942, c. 26 (56 Stat. 23), U. S. C. Title 50, App. Sec. 901, Sec. 205(e).

dence was adduced to show that old-style and new-style soups were kept on the same shelf, but that the price ceilings were properly posted, the shelves properly marked under each type soup, and that any improper marking on the can in question was only as a result of an innocent mistake.

The Court awarded a judgment to the plaintiff in the amount of \$5.00. Thereafter the Price Administrator applied to the Municipal Court of Appeals for the District of Columbia for an allowance of an appeal from that judgment. The application was granted on March 24, 1943. On June 8, 1943, the Municipal Court of Appeals affirmed the judgment of the lower court, Judge Hood dissenting.¹ The Administrator applied to this Court for an allowance of an appeal from the adverse judgment of the Municipal Court of Appeals on June 16, 1943. This court granted the application on August 16, 1943.

STATEMENT OF POINTS.

The point on which the Appellee intends to rely is:

1. The Municipal Court of Appeals properly affirmed the judgment of the trial court awarding \$5.00 in an action brought pursuant to Section 205(e) of the Act.

SUMMARY OF ARGUMENT.

I. Section 205(e) of the Act does not constitute a mandatory direction to the courts to award treble the amount of the overcharge or \$50.00 upon a finding that a sale above an applicable price ceiling has been made. The determination of the amount to be awarded is discretionary in the light of the facts adduced before the court or jury. This construction is required by:

1. The language of the Act,

¹ *Brown v. American Stores*, 31 A. (2d) 388.

2. The purposes underlying the enactment of Section 205(e),

3. The legislative history of Section 205(e), and the language of and construction given to other punitive and remedial statutes.

ARGUMENT.

I.

Section 205(e) of the Act does not constitute a mandatory direction to the courts to award treble the amount of the overcharge or \$50.00 upon a finding that a sale above an applicable price ceiling has been made. The determination of the amount to be awarded is discretionary in the light of the facts adduced before the court or jury.

There is not one single word, phrase, or clause in Section 205(e) directing the courts to apply that section in a mandatory fashion and divesting them of any discretion whatsoever in entering judgments up to \$50.00 or treble the amount of the overcharge as the case may be. The section merely gives the permissive right to bring an action for a maximum which is fixed, but it does not state that the fixed maximum is also an invariable minimum which must be awarded regardless of the circumstances pertaining to the case. Neither the context of Section 205(e) nor the legislative history thereof suggest any unusual meaning be given this section. As the Municipal Court of Appeals said in construing Section 205(e) in the case of *Hall v. Chaltis*, 71 W. L. R. 349, 31 A. (2d) 699,

“The statute merely provides that the plaintiff ‘may bring an action’, etc. An ‘action’ is merely a form of suit by which a plaintiff presents to a court for its determination his demand for money. To ‘bring an action’ has a settled, familiar legal, as well as general meaning. It is synonymous with ‘commencing a suit’. It is the means by which the judicial machinery is set in motion. It is but the commencement of the suit—the

first step by which the the judicial machinery is set in motion. It is conclusive of nothing. It constitutes notice to the defendānt that he has the right and is required to defend himself against the charge. The plaintiff's claim as well as the defense are then submitted to a court or jury, the facts are weighed and the law considered and there follows a judicial determination of the rights of the parties, and whether the 'action' has been sufficiently proven to entitle plaintiff to judgment."

Further, the section being both remedial and punitive should be construed strictly and therefore giving to the words used therein their ordinary meaning, the language quoted from *Hall v. Chaltis, supra*, must of necessity constitute a correct construction.

1. The intent of Congress as revealed by the purposes underlying the enactment of Section 205(e) and the Act, and the legislative history of Section 205(e).

As the appellant states in his brief at page 11, "if any doubt exists, that doubt should be resolved in the light of the situation with reference to which Section 205(e) and the Act were designed to meet, and the policy intended to be served by their enactment . . ." A review of the legislative history of Section 205(e) clearly demonstrates that Congress did not intend the courts to construe this section as a mandatory direction to award judgments of not less than \$50.00 or treble damages, but in fact, by employing the language which it did, conclusively affirmed the existence of that discretion which abides in the courts, and the exercise of which will avoid undue hardships, excessive punishments, absurd results, and keen injustices.

2. The purposes of Section 205(e) in the Act.

The appellee has no argument with the statement of appellant (p. 12 Appellant's brief) that "the primary purpose of the Act is to protect the public from the effects of

skyrocketing, inflationary prices.” Further it is true that to effectuate the purposes leading to the enactment of the Act, that Congress provided by several methods to set up adequate enforcement sanctions. Injunction suits can be brought by the Administrator (Sec. 205(a)), criminal prosecutions were provided for (Sec. 205(b)), and license suspension provisions provided for (Sec. 205 (f)). Section 205(e), however, is merely a fourth and ancillary means of assisting in enforcement. Admittedly, the treble damage section was enacted to enlist the aid of the consumer in the enforcement program and its effectiveness has been proven. The appellant, however, in his brief (p. 12), in endeavoring to resort to language allegedly evidencing a legislative purpose which would demand that the courts arrive at that construction of Section 205(e) for which the appellant contends, very self-servingly omits the two sentences which open the paragraph and chapter headed “Enforcement”, said sentences immediately preceding the quotation incorporated in his brief. The full quotation (Senate Report No. 931 on H. R. 5990, 77th Congress, 2nd Session, p. 8) reads as follows:

“Price control which cannot be made effective is at least as bad as no price control at all. It will not stop inflation, and enables those *who defy regulation* to profit at the expense of the buyers and sellers who unselfishly cooperate in the interests of the emergency. To *discourage* initial violations, the committee substitute provides for actions at law to recover \$50 or three times the amount of the illegal overcharges. This will permit private purchasers who buy for personal use or consumption, rather than in the course of a trade or business, to protect themselves against violations of the Act. The bill in addition authorizes the Administrator to issue or require licenses where he deems such action necessary to assure effective enforcement. The bill also authorizes the Administrator to seek a court injunction against violations of the act, and provides for the punishment of the most flagrant violations by criminal prosecutions subject to the supervision and

control of the Department of Justice.” (Italics supplied)

The omitted sentences clearly and convincingly depict that Congress was intending to secure the aid of consumers in providing adequate enforcement sanctions with regard to those who “defy regulation to profit at the expense of the buyers and sellers”. That is the type of initial violation that Congress endeavored to prevent and that is the class of violator that Congress desired be sued by consumers and in the event of a judgment properly believed the courts in the exercise of their discretion would award the maximum of treble damages or \$50.00 which might be obtained pursuant to the Section. Furthermore the use of the word “discourage” certainly evidences a desire on the part of the Congress to prevent intentional violations, for there is no possible way to “discourage” unintentional, inadvertent, and innocent mistakes.

To adopt the appellant’s position, however, would penalize honest merchants who inadvertently make innocent mistakes, and is to ascribe to the Congress an intent which could not be reconciled with any standard of reason. That Congress did not intend the Section to be construed mandatorily is well reasoned in *Hall v. Chaltis, supra* p. 703 wherein the court states:

“Viewed in a reasonable light, we think it does not mean, as the Price Administrator contends, that every shopkeeper who makes an overcharge of even a few cents must forfeit \$50 to every customer who decides to sue. If that were so a small shopkeeper could unwittingly put himself out of business in a few minutes by making a series of small overcharges, however innocent his intentions.

“Widespread bankruptcies might easily engulf unwary shopkeepers, large and small, if the contention of the Administrator were adopted as law; for he takes the frank position that every overcharge means a violation and that upon every bare showing of an overcharge, without more, a consumer becomes automatic-

ally entitled to the maximum. We do not think Congress intended any such sweeping punitive measure, for it would actually serve to defeat one of the very purposes of the Act which is stated in the preamble, 'to prevent hardships to persons engaged in business'."

"Black markets should be suppressed and profiteers punished by every lawful means. On the other hand the innocent should not be swept into court with the guilty and denied an opportunity to present a reasonable defense."

Finally, the appellant's statement (Appellant's brief p. 13) that the purpose for the enactment of Section 205(e) cannot be accomplished if the award is not mandatory is wholly unwarranted in the light of past experience as well as from the statements appearing in the appellant's brief itself. (Appellant's brief p. 13.) Appellant admits that the Section has had an efficacious effect, although some eight cases have been awarded less than \$50 for violations of the Act. It must be presumed as is true even in the District of Columbia, that the courts know how to exercise their discretion and will assess the maximum if the facts warrant the same. Judge McMahon, the presiding judge in the instant case in the court of first instance, has since the award in this case assessed the maximum of \$50.¹ The only fair conclusion to arrive at from the appellant's contention is that it fears the judicial system as provided for by the Constitution of the United States, and is desirous solely of substituting administrative policy and demands for just determination before bodies which have since the founding of this country been deemed to be the proper forum for the determination of the rights and wrongs of situations. This conclusion is particularly evident when it is realized that the appellant in his brief, page 12 thereof, in an endeavor to strengthen his argument with reference

¹ Washington Times-Herald, Sunday April 18th, page 1 reported that on April 17th Municipal Court Judge McMahon ordered payment of \$50 to a housewife for an overcharge of 1c on a can of soup. The newspaper account states: "In reaching the decision Judge McMahon termed the alleged sale 'a deliberate violation of OPA ceiling price regulations.'"

to consumer participation endeavors to rely on the "hold the line" order of the President, (8 Fed. Reg. 4681, April 10, 1943), an Executive Order issued more than a year subsequent to the enactment of the section in question. Certainly that order can have no historical significance whatsoever.

3. Legislative history of Section 205(e) and the language of and construction given to other punitive and remedial statutes.

Reference to the legislative history of 205(e) convincingly demonstrates that Congress did not intend that section to be interpreted nor applied in the manner advocated by the appellant. Not once throughout the debates, hearings, and reports is it stated that this section is a mandatory ukase to the courts. It is interesting to note that Mr. David Ginsberg, former General Counsel for the Office of Price Administration stated before the Committee on Banking and Currency.¹

"Of course, rationing power is exercised by the Office of Production Management under Public No. 89, so that so far as price is concerned, I think the regulations should require the seller to display the price and inform the purchaser of what the price would be. That would be all that would be necessary. *If he refused to do that, if he would not do it*, the only thing I think that would be necessary for the buyer to do would be to prove that he was sold an article at a price above the fixed price." (Italics supplied)

It is readily observed therefore that at the time of the introduction of this legislation that not even the appellant contemplated the stringent interpretation with its harsh, unjust and absurd results for which the appellant now contends.

In endeavoring to ascertain whether or not this section is in fact identical or really similar to other punitive and remedial statutes, a review of the record in this case will

¹ Hearings before Committee on Banking and Currency, House of Representatives on HR 5479, 77th Congress, 1st Session, page 764.

reflect that the appellant has constantly endeavored to analogize first with one type of statute and then with another. The legislative history likewise reflects that rather than being identical with or really similar to any other such type statutes, this section is of a genus alone and to itself.

When this section was first discussed¹ Representative Sumner in effect asked Mr. Henderson, former Price Administrator, the purpose of that section, and Mr. David Ginsberg, former General Counsel of the O. P. A. requested permission to respond and stated:

“This provision is similar to one contained in the English bill.”

A reading, however, of the English provision² will reflect

¹ Hearings before Committee on Banking and Currency, *supra* page 763.

² Volume No. 32, The Complete Statutes of England, Classified and Annotated, in Continuation Volume 1939, page 1250-1251 contains the provision which Mr. Ginsberg no doubt referred to. It is as follows: (The title of that section is “Right of Buyer to Avoid Prohibited Transaction or to Recover the Excess Price”. The British annotation as to the meaning of this section is very interesting.)

“This section provides the buyer with civil remedies where there has been a sale or agreement to sell goods above the permitted price in contravention of Section 1, ante. The buyer is given an option. He may either avoid the sale or agreement, or affirm it.

“These rights only exist when there is a contravention of Section 1, and there has been a prosecution in respect of the sale or agreement in question, or a sale or agreement to sell similar goods in the same business. Thus a trade will not have to face the publicity of such an action in the civil courts without having the safeguards inserted in Section 8, ante, to prevent unfair publicity by unjustified prosecutions.

“Under subsection 2, if the buyer elects to avoid the sale or agreement, he will then no longer be liable to pay any part of the price outstanding, and he may recover anything he has already paid * * *”

Section 8 ante, referred to in this annotation provides as follows for the protection of the seller:

“Where it appears to a local price-regulation committee that there has been a contravention in their locality of any of the provisions of Section one of this Act and the committee, after giving to the alleged offender an opportunity of making representations to them, and, if so requested by him, of being heard by them, are of opinion that a prosecution ought to be instituted in respect thereof, the committee shall report the alleged contravention to the central price-regulation committee who, if they are of the same opinion, shall request the Board of Trade to institute proceedings accordingly, and the central price regulation committee shall make a like request in a case in which they think fit to investigate an alleged contravention themselves and are of opinion, after giving to the alleged offender such an opportunity as aforesaid, that a prosecution ought to be instituted.”

that it too is as basically different from the language employed in Section 205(e) of the Emergency Price Control Act as is the language employed in Section 16(b) of the Fair Labor Standards Act of 1938 and all other statutes providing for double or treble damages. In fact, it will be seen that the British method of handling the situation is one in which it anticipates unjust accusations and endeavors to prevent the same from receiving publicity and resultant harsh penalties inflicted on honest merchants.

Thereafter Mr. Ginsberg stated that this provision was similar to the provision found in the Fair Labor Standards Act¹, but a review of that section will reflect too that the section in question is not in fact similar to it. For the convenience of the Court there are set out below other so-called remedial and punitive sections none of which it is submitted is in fact similar to the section in question.² Having reviewed so-called similar statutes, therefore and finding in no single instance that the language employed therein

¹ Fair Labor Standards Act of 1938, c. 676, Sec. 1, 52 Stat. 1060, 29 U. S. C. 201 et seq.

² Act of July 8, 1870, c. 230, Sec. 59, 16 Stat. 207—R. S. Sec. 4919, Title 35 U. S. C. Sec. 67. "Court may enter judgment for any sum above the amount found by the verdict (not exceeding three times the amount of such verdict) * * *"

Act of Feb. 20, 1905, c. 592, Sec. 16, 33 Stat. 728, Title 15 U. S. C. Sec. 96. "Court may enter judgment therein for any sum above the amount found by the verdict * * * not exceeding three times the amount of such verdict together with the costs."

Act of Mar. 19, 1920, c. 104, Sec. 4, 41 Stat. 534, Title 15 U. S. C. 124. "Court may enter judgment therein for any sum above the amount found by the verdict * * * not exceeding three times the amount of such verdict together with the costs."

Act of Sept. 8, 1916, c. 463, Sec. 801, 39 Stat. 798, Title 15 U. S. C. 72. "Any person injured * * * may sue * * * and shall recover threefold the damages sustained and the cost of the suit including reasonable attorney's fees."

Act of July 2, 1864, c. 216 Sec. 15, 13 Stat. 362; June 20, 1874, c. 331, 18 Stat. 111; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167, Title 45 U. S. C. 83. " * * * the party injured * * * may bring an action * * * and upon recovery the plaintiff shall be entitled to judgment for treble the amount of all excess of freight and fares collected by the defendant and for treble amount of damages sustained by the plaintiff by such failure or refusal."

Act of June 25, 1938, c. 676, Sec. 16, 52 Stat. 1069, Title 29 U. S. C. 216. "Any employer who violates the provisions of Section 206 or Section 207 of this Title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages or their unpaid overtime compensation as the case may be, and in an additional equal amount as liquidated damages * * *"

is in fact similar to the language employed in Section 205(e) the question may properly be asked why did the Congress being aware of the language which it had theretofore employed, depart from any precedent and employ language which distinctly differs from the language theretofore used. This court in the case of *Brown v. Hecht Company*¹ succinctly gives the reason which has been relied upon by this appellee at all times in this proceeding. In that opinion, page 7, this court stated:

“The words ‘upon a proper showing’, qualifying ‘shall be granted’ in the Securities Exchange Act, had been thought to give a court discretion to deny an injunction when it would not be ‘consistent with the general principles of equity’ to grant one. *We infer that it was precisely for the purpose of avoiding that result that the Senate Committee changed the language of Sec. 205(a).*” (Italics supplied.)

That is exactly the contention which has been advanced at all times by this appellee and the result it is submitted which the Congress intended to avoid was the result which had been bewailed by the courts in construing Section 16(b) of the Fair Labor Standards Act, *supra*. In the case of *Overnight Transportation Company v. Missell*² the court stated:

“Is this provision of the law as to liquidated damages mandatory or discretionary? Since the Act has been violated in good faith in this case, we would indeed like to hold that it is discretionary. It seems a keen injustice for employers bewildered by strange legislation and confused by divergent authority in the courts to be subjected to such a measure. Yet no matter how might we lament its harshness, the Section appears to be mandatory and virtually all the courts have so construed it.”

It will be noted that the language that the Congress used in that instance was

¹ App. D. C., July 22, 1943, O. P. A. Ser. 620:156.

² 126 F. (2d) 98, affirmed 316 U. S. 572.

“Any employer who violates the provision of section 6 or section 7 of this Act shall be liable * * * in the amount of * * * unpaid overtime compensation * * * and in an additional equal amount as liquidated damages.”

The pertinent words requiring a mandatory construction are “shall be liable” and “an additional equal amount as liquidated damages”. Conclusively therefore, it must be inferred that the obvious omission of that language was intentional and was an endeavor by the Congress to obviate “keen injustices”. It is quite apparent that the appellant is actually endeavoring to read into this statute language such as appears in the Act of September 8, 1916, C. 463, Sec. 801, (30 Stat. 798) U. S. C. Title 15 Sec. 72 Par. 3, which states:

“Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, *may sue* therefore in the district court of the United States for the district in which the defendant resides or is found or has an agent, *without respect to the amount in controversy*, and *shall recover three-fold the damages sustained*, and the cost of the suit including a reasonable attorney’s fee.” (Italics supplied)

It will be noted in that section that while a person is merely given permission to sue, the statute specifically provides that such person “*shall recover* threefold the damages sustained”.

To adopt the appellant’s contention would require the award of unwarranted punishment in cases such as the present without opportunity for review. It is submitted that in this regard the case of *Brown v. Hecht Company*, *supra*, again expresses thoughts which require the construction advanced by the appellee. C. J. Eiker, in his concurring opinion in that case stated:

“I concur fully in Judge Edgerton’s opinion, but upon reading Chief Justice Groner’s dissenting opin-

ion I deem it appropriate to add several supplemental observations. It is difficult for me to view an injunction which merely forbids violation of the law as a punishment. Further violations are not only threatened in this case, but are claimed to be unavoidable. *If, after injunction, they do occur, and contempt proceedings follow, then for the first time do quasi-criminal sanctions come into play and penalties may be imposed. Before doing so, courts can and will give full weight to a showing that violations have been inadvertent and innocent and not wilful, for in such an inquiry the courts are no longer under statutory mandate, but are exercising their inherent powers.*" (Italics supplied.)

However, that opportunity referred to when the nature of the alleged violation may be weighed will be forever gone if this Court adopts the appellant's contention. The doors for fraud will be thrown wide open. Should unscrupulous consumers connive with employees of sellers and by such connivance pay over-the-ceiling prices, the construction advanced by the appellant would still leave no course of action in the courts but to award treble damages or \$50. The opportunity thereafter for the seller to recoup against the wrongdoers would be expensive and arduous. Certainly Congress did not intend this legislation to be aid to potential frauds. C. J. Groner's dissent in the case of *Brown v. Hecht Company, supra*, is certainly applicable to this section. He said:

"More than appears, I think, is necessary to justify the assumption that Congress intended to coerce judicial action and to destroy judicial discretion * * *."

The reasonableness of the construction given to this statute to date in the present case is ably presented by the Municipal Court of Appeals when it stated (*Brown v. American Stores, supra*):

"In *Hall v. Chaltis* we held that a consumer's right to bring an action for the sum of \$50, conferred by Section 205(e) of the Emergency Price Control Act, did

not make a judgment for this amount mandatory in the absence of language imposing a fixed liability on the seller. Our decision on that appeal, to which both the plaintiff therein and the administrator as intervenor were parties, covers the instant case. Neither party applied to the United States Court of Appeals for the District of Columbia for a review. After careful consideration of the opinion we then rendered, we adopt it as the basis for our present decision. The circumstances of the case before us serve to further impress us with the soundness of its reasoning, *that Congress could not have intended to penalize alike the inadvertent mistake of the merchant who honestly and intelligently endeavors to comply with the law and the contumacy of one who dishonestly violates it.*"

In passing, the Court's attention is again directed to *Hall v. Chaltis*, *supra* as an answer to the appellant's query appearing on pages 20 and 21 of his brief as to how the award of \$5.00 in the light of the facts in the instant case is justified. The court stated:

"The quoted section of the Act is both remedial and punitive: remedial in that it provides the method for collecting an overcharge, merely by way of compensation; and punitive in that it authorizes a plaintiff to claim an additional sum which would not otherwise be recoverable. It is in essence a statutory sanction written into the Act to encourage consumer-actions. Thus it amounts to a penalty without reference to the actual amount of damage and is not different from a forfeiture in money."

Before concluding, therefore, the appellee directs this court's attention to certain fundamental precepts:

1. The language of the statute is plain and Congress therefore must have intended the plain meaning of the language used and its intention is to be collected from the words so employed.¹

¹ *Berens v. Byram et al.*, 26 F. (2d) 953, 957; *United States v. Stewart*, 311 U. S. 60, 63; *Moran v. Cobb*, 120 F. (2d) 16, 19, USCA D. C.; *United States v. Wiltberger*, 18 U. S. 76, 94, 95.

2. It is the duty of the court to declare what the law is, and not to surmise what may be the policy of the Government.²

3. Courts of this country have repeatedly stated that acts of Congress are to be given a sensible construction.² It is submitted that the only sensible construction is that advanced by the appellee, for not even a layman could concur in the appellant's argument on any "common sense" basis.

4. Acts of Congress are to be construed if possible to avoid unjust or absurd conclusions if possible.³ The facts in the instant case clearly show that the application of the appellant's construction would demand that both an unjust and an absurd conclusion be reached.

5. Finally, as was stated in the case of *Collins et al v. Kidd et al*⁴ the court stated:

"To make a law unreasonable is to make it unpopular and to make it unpopular is to destroy it."

It is submitted that an adoption of the appellant's contention would of necessity bring about a situation as decried above.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment of the court below should be affirmed.

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¹ *Dewey v. United States*, 178 U. S. 519.

² *United States v. Katz*, 271 U. S. 354-357; *Wilson v. United States*, 77 F. (2d) 236, Cert. Den. 295 U. S. 759.

³ *Moran v. Cobb*, 120 F. (2d) 16, 20; *Sorrels v. United States*, 287 U. S. 435, 447.

⁴ 38 Fed. Supp. 634, 638.

